IN THE

Supreme Court of the United States

No. 76-5325

OCTOBER TERM, 1976

BEN EARL BROWDER,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Whether the probable cause standard requires that an offender's identity be positively ascertained before an arrest can be made.

2. Whether an arrest warrant is necessary to enter a private dwelling for the purpose of effecting an arrest when the arresting officers gain peaceful admittance to the dwelling with the knowledge and consent of the owner.

3. Whether petitioner's Fourth Amendment claim has been waived under the test established in *Wrainwright* v. *Sykes*, ——, U.S. ——, 45 L.W. 4807 (1977).

4. Whether petitioner's Fourth Amendment claim is cognizable under the Habeas Corpus Act in light of *Stone* v. *Powell*, 428 U.S. 465 (1976).

5. Whether respondent's notice of appeal was timely filed in the district court.

STATEMENT

On January 29, 1971, at approximately 7:30 p.m., Sharon Alexander, a fifteen year old female Negro was forced into the basement entrance of a building at 3922 West Van Buren Street, Chicago, Illinois and raped by two male Negroes (A. 130, 154). After the two assailants released her, Miss Alexander ran to her home located at 3904 West Van Buren Street and her mother called the police (A. 131). Officer James Newson responded to the call (A. 125). Miss Alexander informed Officer Newson of the circumstances surrounding the rape and described the assailants as two Negro males in their late teens, one light-complexioned and one dark-complexioned both wearing brown jackets (A. 126). After this brief conversation Officer Newson transported Miss Alexander and her mother to the Cook County Hospital (A. 126). At approximately 9:30 p.m., that same night, Investigator Stan Thomas arrived at the hospital after receiving an assignment to interview Miss Alexander (A. 129). Although Miss Alexander was visibly upset, she relaxed after a few minutes and was then able to give Investigator Thomas a full description of the attack and her attackers (A. 130). She stated that the last name of one of the assailants was "Browder" and that he lived in the 4000 block of West Monroe Street, Chicago (A. 130), and that he was approximately 17 years of age (A. 132). She also stated that she was acquainted with "Browder's" sister (A. 130). The other assailant, a light-complexioned male Negro approximately 17 years of age, was unknown to her (A. 130). She also related that after the rape "Browder", who was armed with a gun, threatened that if she told anyone he would kill her (A. 131). On January 31, 1971, Investigator Thomas conveyed the information supplied by

Miss Alexander to Youth Officer Conroy and enlisted his aid in locating the assailant named Browder (A. 132). Officer Conroy reviewed the juvenile files retained at police headquarters and discovered a file for a Tyone Browder, a 16 year old male Negro residing at 4053 West Monroe Street, Chicago (A. 139). Immediately thereafter Officer Conroy personally interviewed Miss Alexander at her home and confined the information he had received from Investigator Thomas (A. 140). After verifying through a local resident that a Browder family in fact lived at 4053 West Monroe Street, Officer Conroy telephoned Mrs. Lucille Browder, petitioner's mother (A. 141). He advised Mrs. Browder that he was a Youth Officer investigating an assault upon a girl and that the victim had stated that a teen-aged Browder was the assailant. He also indicated that he had the name Tyrone Browder on record (A. 141-142). Mrs. Browder responded that "if it was an assault on a girl it wouldn't be Tyrone, it would be Ben Earl". (A. 142).[1] After receiving an affirmative response to his inquiry of whether petitioner and Tyrone were at home, Officer Conroy asked if Mrs. Browder would keep them home so he could come and talk with them (A. 12).

Officer Conroy, together with three other officers, arrived at the Browder residence at approximately 6:00 p.m., that same day, January 31, 1971 (A. 12). At the door Officer Conroy identified himself to Mrs. Browder as the officer

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1. At the evidentiary hearing in federal district court Mrs. Browder denied making any such statement (A. 151). Both the district court and the court of appeals assumed that Mrs. Browder did in fact make the statement attributed to her but found it did not establish probable cause (A. 114, 166 n.1).

who had talked with her earlier over the telephone. Mrs. Browder invited the officers inside and introduced them to petitioner, Tyrone and two other teen-age males (A. 142). In the living room Officer Conroy stated to those present that he was investigating a rape and had information that a teenage Browder was involved. Petitioner and Tyrone denied any knowledge of the crime (A. 143). They were arrested and advised of their constitutional rights (A. 27). Then, in the words of Officer Conroy:

> I suggested to the others present, they were about the same age and height, and that if they came along it is possible that the victim wouldn't identify anyone, because there would be so many. I suggested if I brought one she would maybe point out one, and the other two fellows agreed to come along. . . .
>
> Before we left I said that 'It is possible one of you will be identified, because there is supposed to be a second guy involved, besides Browder', and I informed them of their Constitutional rights. (A. 143).

Mrs. Browder declined the officers' offer to accompany her sons to the police station (A. 41).

The four youths were taken to the police station and the arresting officers began preparation for Miss Alexander to view a lineup (A. 143-144). At the station an Officer James, not involved in the investigation of the Alexander rape, noticed that petitioner fit the description of an individual (a male Negro, seventeen years old, with a cast on his right arm) who had raped Johnnie May Johnson on January 30, 1971 (A. 157).[2] Miss Johnson was then summoned to view

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2. The rape occurred on January 30, 1971, at approximately 5:45 p.m., in the basement of a building located at 4148 W. Adams Street, Chicago, Illinois (A. 158). The assailant also took Miss Johnson's wristwatch and money at gun-point (Tr. of Proceed., Aug. 26, 1971 at 130-132). The scene of the rape and armed robbery was approximately one block from petitioner's residence (A. 53).

the lineup. A lineup was conducted at approximately 7:00 p.m., in which petitioner, his brother, the two other persons arrested at the Browder residence and one additional person participated (A. 144). All participants were male Negroes in their teens, five feet seven inches to approximately five feet eleven inches in height (A. 144). Petitioner was the only participant with a bandage or cast on his right arm (A. 20). After viewing the lineup separately, both Miss Alexander and Miss Johnson identified petitioner (A. 145). Upon being identified petitioner called Officer Conroy off to the side and started to confess to the rape of Miss Johnson (A. 56, 28). Officer Conroy interrupted him by saying "wait a minute" and advised petitioner of his constitutional rights (A. 56). Petitioner then confessed to raping Miss Johnson but denied possessing a gun at the time and also denied raping Miss Alexander (A. 28-29). Ot this point Officer Conroy summoned investigator Thomas (A. 57). Thomas readvised petitioner of his rights and petitioner again confessed (A. 44). Petitioner was charged with the rape and armed robbery of Miss Johnson and the rape of Miss Alexander (A. 158). Tyrone Browder and the other two teen-age males were released (A. 72). Petitioner was only tried on the charges stemming from the rape of Miss Johnson.

Prior to trial petitioner's court-appointed attorney filed various pre-trial motions including a motion to suppress the lineup and in-court identifications on the basis of an impermisively suggestive lineup and a motion to suppress the confession on the basis of inadequate Miranda warnings and mental coercion (A. 17-19). After an evidentiary hearing both motions were denied (A. 49-50). The issue of the legality of petitioner's arrest was not raised in the trial court. On August 27, 1971, after a jury trial, petitioner was found guilty of rape and not guilty of armed robbery (A. 101).

On direct appeal to the Illinois Appellate Court, First District, petitioner for the first time attempted to raise the issue that his arrest was unlawful (A. 9). The Appellate Court held that the unlawful arrest issue had been waived by petitioner's failure to raise it in the trial court (A. 9). Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied. 54 Ill. 2d 597 (1973).

Subsequently petitioner filed a petition pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., Ch. 38, sec. 122-1 et seq. The petition was dismissed by the trial court and the dismissal was upheld on appeal (A. 108).

A petition for a writ of habeas corpus was filed in the United States District Court for the Northern District of Illinois on January 8, 1975. On February 11, 1975, respondent filed a motion to dismiss the petition. Because petitioner's appeal from the denial of his post-conviction petition was still pending in the Illinois Appellate Court, habeas proceedings were stayed by the district court on March 7, 1975 (A. 1). On October 21, 1975, the district court entered an order both denying the motion to dismiss and granting the writ (A. 110-117). The order also recited, "Respondent given sixty days to retry the petitioner or the Writ of H.C. shall be executed" (A. 110). The issuance of the writ was based upon the fact that the state trial record, the only evidence then before the court, did not establish probable cause for petitioner's arrest (A. 114). On November 18, 1975, respondent filed a motion to further stay execution of the writ and to conduct an evidentiary hearing on the merits of the petition (A. 118). The motion was based upon the fact that the district court's issuance of the writ on the sole basis of the state court record was erroneous since the probable cause issue had never been litigated in state court and therefore the paucity of evidence in the

record relating to the probable cause issue, understandable (A. 119). Respondent's motion was granted (A. 120), and an evidentiary hearing was held on January 7, 1976 (A. 121). The hearing provided the first opportunity for a judicial assessment of the sufficiency of the facts supporting petitioner's arrest. Nineteen days after the hearing the district court denied respondent's motion stating "following an evidentiary hearing and further argument by the parties the court finds that the writ of habeas corpus was properly issued on October 21, 1975" (A. 161). No findings of fact were made. Execution of the writ was stayed for five days pending filing of notice of appeal (A. 161). Respondent filed a notice of appeal on January 27, 1976 (A. 162). On April 28, 1976, the Seventh Circuit Court of Appeals reversed the order granting the writ holding that the facts developed at the evidentiary hearing established probable cause for petitioner's arrest (A. 164).

SUMMARY OF ARGUMENT

I.

An arrest is valid under the Fourth Amendment if it is supported by probable cause and effected in a reasonable manner.

At the time of petitioner's arrest the arresting officers knew that Miss Alexander's assailant was a dark-complexioned male Negro, approximately seventeen years of age, with the last name of "Browder", who lived in the 4000 block of West Monroe Street, Chicago, Illinois. These facts supplied the officers with reasonable grounds to believe that petitioner was the rapist. The fact that upon entering petitioner's residence the officers were confronted with another individual, petitioner's brother Tyrone, who also fit the description in every respect, did not negate the existence of probable cause for petitioner's arrest. Neither does the arrest of petitioner's brother weaken the basis for petitioner's arrest. In judging the legality of the arrest of more than one suspect the "substantiality of the basis for each arrest should be considered independently". ALI, *A Model Code of Pre-Arraignment Procedure* 134-135 (1975). The arrests for which sufficient basis exist are proper; those for which a sufficient basis does not exist are improper. Any rule which automatically requires a finding of no probable cause when more than one suspect is arrested does an injustice to the Fourth Amendment since it unduly restricts the "leeway" due law enforcement officials in protecting the community and does nothing to further the individual's right to be free from an arrest not supported by sufficient facts.

The common law rule, still followed in the vast majority of jurisdictions, was that a warrantless arrest entry into a private dwelling was permissible if there existed probable cause to believe the person sought had committed a felony, was within the dwelling and the method of entry was reasonable. This rule is far superior to any suggested alternative and should be adhered to today. However, regardless of what the general rule governing warrantless arrest entries should be, it is clear that no warrant was necessary in this case because petitioner's mother voluntarily admitted the officers into her home. After telephoning Mrs. Browder, to advise her that they were coming, the officers arrived at the residence and were "invited" in by Mrs. Browder. Mrs. Browder's consent vitiated any need for a warrant. Even if consent was lacking, a warrant was not required since the entry was at a reasonable hour, peacefully accomplished and at least acknowledged by the owner. Additionally, probable cause existed to believe that petitioner committed a rape and was within the premises and no search of the premises was conducted.

II.

Petitioner cannot present his claimed Fourth Amendment violation by way of federal habeas corpus because he has waived the issue under *Wainwright* v. *Sykes*, —— U.S. ——, 45 L.W. 4807 (1977) and the issue itself is not cognizable in habeas proceedings in light of *Stone* v. *Powell*, 428 U.S. 465 (1976).

Illinois law requires that Fourth Amendment claims be raised in the trial court. Failure to do so constitutes a waiver of the claim. Petitioner has not established sufficient "cause" for his failure to raise his claim in the trial court. Indeed, whatever the precise scope of the cause requirement it is not met where, as here, petitioner's state trial

counsel did object to the admission of the evidence challenged in the habeas petition but on grounds other than petitioner suggests, knew of the facts forming the basis for the objection raised in the habeas petition and actually used those facts in the defense, and is not alleged to be incompetent. Neither has petitioner established that he was "prejudiced" by the alleged constitutional violation. Failure to exclude unlawfully obtained evidence cannot prejudice an individual defendant since the exclusionary rule is not intended to benefit him but to benefit society as a whole in its attempt to deter unlawful police conduct. In any event petitioner was not prejudiced because the challenged evidence was reliable in nature and therefore did not effect adversley the fairness of the proceedings.

The Illinois procedures permitting an attack on allegedly unconstitutionally seized evidence also provided petitioner with an "opportunity for full and fair litigation" of his Fourth Amendment claim in state court. The Illinois procedures insure that evidence illegally obtained will not be used at trial against a defendant thereby deterring future illegal searches and seizures by police. Thus, the purpose behind the requirement of an opportunity to litigate the issue in state court is served by Illinois procedures and petitioner is barred from raising his claim in a habeas action. Notwithstanding petitioner's assertion, the nature of the challenged evidence has no bearing on the analysis since petitioner does not contend that the manner in which the evidence was obtained affected its reliability.

III.

A final, appealable order was not entered by the district court until it had complied with all the requirements of the Habeas Corpus Act. One such requirement is that the district court decide on the basis of the petition and return

if an evidentiary hearing is required. The order of October 21, 1975, granting the habeas petition includes no finding that a hearing was not required, and any such finding would have been erroneous. As of October 21, 1975, the only documents before the court were the petition and supporting memorandum, a motion to dismiss and supporting memorandum and the state court record. The state court record disclosed that the illegal arrest issue had never been raised in the state trial court. Nevertheless, the district court granted the writ without an evidentiary hearing on the basis that the state court record did not establish probable cause. Twenty-eight days after the ruling, respondent filed and the court allowed a motion for an evidentiary hearing under the Habeas Corpus Act. Only after the district judge had conducted the evidentiary hearing were all the steps required by the Act completed and only then could a final order be issued. Accordingly, the final order in this case was the district court's order of January 26, 1976 reaffirming the order of October 21, 1975. Even if the October 21, 1975 order was a final order, *United States* v. *Dieter*, —— U.S. ——, 97 S. Ct. 18 (1976) requires that the time within which to appeal run from the January 26, 1976 order.

ARGUMENT

I.

THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS NOT VIOLATED BY THE WARRANTLESS ARREST OF PETITIONER SINCE THE ARREST WAS BASED ON PROBABLE CAUSE AND EFFECTED IN A REASONABLE MANNER.

A.

Probable Cause Existed For Petitioner's Arrest Since The Arresting Officers Knew That Either Petitioner Or His Similar Looking Brother Was One Of Miss Alexander's Assailants. The Probable Cause Standard Does Not Require That An Offender's Identity Be Positively Ascertained Before An Arrest Can Be Made.

The police officers who arrested petitioner on the evening of January 31, 1971, possessed the following information concerning the identity of one of the two assailants of Sharon Alexander:

1. He was a dark-complexioned male Negro (A. 26) in his late teens, approximately seventeen years of age (A. 132);

2. His last name was Browder and he lived in the 4000 block of West Monroe Street, Chicago, Illinois; and

3. Tyrone Browder, a dark-complexioned male Negro (A. 153) sixteen years of age (A. 139) and Ben Earl Browder, a dark-complexioned male Negro approximately seventeen or eighteen years of age (A. 142), resided at 4053 West Monroe Street, Chicago, Illinois (A. 139, 141, 142).

Petitioner does not contest the fact that the arresting officers possessed this information but contends that the information was insufficient to establish probable cause for his arrest. Petitioner reasons that the probable cause standard required a description of sufficient detail to rule out any possible suspect other than petitioner. Since the police were unable to definitely determine which of the two Browders actually committed the rape prior to arrest, petitioner concludes that neither could be arrested. Respondent submits that the Fourth Amendment does not require that the focus narrow to just one person in order for probable cause to exist.

As the term probable cause implies, "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment". *Hill* v. *California,* 401 U.S. 797, 1111 (1971). More than bare suspicion but less than evidence that would justify conviction is required. *Brinegar* v. *United States,* 338 U.S. 160 (1949). The flexibility of the standard is necessitated by the dual purpose it serves. On one hand the arresting officer must possess sufficient facts establishing a reasonable belief of guilt in order to protect citizens from arrest based on no more than whim or caprice. On the other hand facts demonstrating certainty of guilt are not required in order to give fair leeway in protecting the community in the often ambiguous situations confronting law enforcement officers. *Brinegar* v. *United States, supra,* at 176.

In light of the nature and purpose of the probable cause standard the same test should be used in determining when probable cause exists for an arrest whether a single person or several persons are arrested. The test is simply whether a police officer could reasonably believe the person or persons arrested guilty of a crime based on all the facts and

circumstances within his knowledge. *Brinegar* v. *United States, supra,* at 175. In judging the legality of the arrest of more than one suspect the "substantiality of the basis for each arrest should be considered independently". American Law Institute, *A Model Code of Pre-Arraignment Procedure* 134-135 (1975). The arrests for which sufficient basis exist are proper. Id.[3] To establish a per se rule that when more than one person is arrested all arrests lack probable cause is not required by the Fourth Amendment and in fact does an injustice to it. As long as there is a sufficient factual basis to support a particular arrest, whether or not a single person or a group of persons is arrested, the arrested individual's rights under the Fourth Amendment are not violated. However, if reasonable grounds exist for the arrest of more than one person and police are precluded from effecting the arrests merely because they are not in a position to definitely know which arrestee will eventually be identified as the perpetrator, the salutory purpose of the Fourth Amendment in providing sufficient leeway in ambiguous situations for the communities protection is nullified. The instant case provides the perfect illustration.

The arresting officers had a highly specific description of one of Miss Alexander's assailants including last name, address, approximate age and general physical appearance.

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3. Professor Perkins concurs in this analysis. See, Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 238 (1940). The Restatement of Torts illustrates the Rule thusly:

> A sees B and C bending over a dead man D. B and C each accuse the other of murdering D. A is not sure that either B or C did the killing, but he has a reasonable suspicion that either B or C killed D. A is privileged to arrest either or both. Restatement of Torts (Second), Section 119, illustration 2 (1965).

When the officers arrived at the Browder home to effect the arrest, they were confronted with petitioner and his brother, Tyrone, each fitting the assailant's description in every particular.[4] At this point the officers possessed sufficient facts upon which to draw the reasonable conclusion that one or the other or possibly both raped Miss Alexander. The officers adopted the only reasonable course of action in arresting both. The alternatives were unreasonable. To arrest neither Browder would not only create the likelihood of flight but would also give the true assailant the opportunity to make good on his threat to Miss Alexander's life. To arrest only petitioner or his brother would be to gamble with these possibilities. Petitioner's rights under the Fourth Amendment were not violated since an independent examination of his arrest discloses a sufficient factual basis. See, *Code of Pre-Arraignment Procedure, supra,* at 135.

Miss Alexander was able to proivde such a detailed description of petitioner because she attended school with petitioner's sister (A. 140). In most cases the police are not so fortunate. The description which a victim supplies of an assailant will very rarely justify an officer in believing that a person who appears to meet the description

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4. Petitioner and his brother, Tyrone, each had the same last name and lived at the same address. Both were dark-complexioned male Negroes. Petitioner was seventeen years of age (A. 84), Tyrone was sixteen years of age (A. 139). The record contains no specifics as to height or weight at the time of the crime. However, there is some indication that the height differential was minimal since at the time of the evidentiary hearing in district court Tyrone was 6′ 1″ in height and petitioner was 6′ 2″ in height (A. 153).

is definitely, or even most likely, the true offender. In the normal case a victim's description could literally fit hundreds of people. See, e.g., *Chambers* v. *Maroney,* 399 U.S. 42 (1970). Petitioner's contention notwithstanding, the police are justified in effecting arrests in these cases if the arrest is reasonably supported, not conclusively supported, by the description. See, *Chambers* v. *Maroney, supra.* Even in the rare case where police are supplied with the name and address of the offender there is no assurance that the person arrested pursuant to such information is actually the offender sought. See, *Hill* v. *California,* 401 U.S. 797 (1971). Indeed the question of identity is frequently the subject of many hours and even days of jury deliberation.

Petitioner's attempt to analogize the present factual situation with that found in *Davis* v. *Mississippi,* 394 U.S. 721 (1969), is thwarted by the controlling fact that in *Davis* police did not have sufficient facts to support any arrest, whereas petitioner's arrest was supported by facts sufficient to establish probable cause.[5] See, *Cupp* v. *Murphy,* 412 U.S. 291 (1973). Neither does the fact that two other teenage males were arrested together with petitioner and his brother serve to bring this case within the proscription of *Davis*, since those arrests in no way negate the probable cause for petitioner's arrest. Whatever remedies the two teenagers might have, assuming their unlawful arrest, none inure to the benefit of petitioner. Cf. *Alderman* v. *United States,* 394 U.S. 165, 171-72 (1969). *Mallory* v. *United States,* 354 U.S. 449 (1957), also cited by petitioner in-

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5. In *Davis,* the police fingerprinted twenty-four Negro youths and interrogated another forty or fifty Negro youths on no basis other than the assailant was a "Negro youth". 394 U.S. 722.

volved the federal requirement of a prompt arraignment. *Mallory* does not hold or even imply that the focus must narrow to a single person before an arrest can be made.

B.

An Arrest Warrant Was Unnecessary Since The Arresting Officers Gained Peaceful Admittance To Petitioner's Dwelling With The Knowledge And Consent Of Petitioner's Mother.

The lawfulness of arrests for state offenses by state officers is to be determined by state law insofar as it is not violative of the Federal Constitution. *Ker* v. *California*, 374 U.S. 23, 37 (1963). By statute in Illinois, a peace officer with or without a warrant is authorized to arrest any person he has grounds to believe committed an offense at any time of the day or night anywhere in the jurisdiction of the state. Ill. Rev. Stat., Ch. 38, secs. 107-2, 107-5. The Illinois Supreme Court has held that a warrantless arrest entry onto the premises of the person sought is lawful even in the absence of hot pursuit, exigent circumstances or consent. *People* v. *Johnson*, 45 Ill. 2d 283, 259 N.E. 2d 57 (1970). However, before making a forcible entry an officer must be refused admittance after he has announced his authority and purpose. *People* v. *Barbee*, 35 Ill. 2d 407, 220 N.E. 2d 401 (1966). Clearly, the method used in effecting petitioner's arrest falls within the bounds of Illinois statutory and case law. The remaining question, whether the arrest procedures violated the Fourth Amendment of the Federal Constitution, is addressed below.

The common law antecedents of the Fourth Amendment supply the appropriate starting point for an inquiry into the warrant requirements of the Amendment. *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

At common law a peace officer was authorized to arrest without a warrant for a misdemeanor committed in his presence and for a felony, whether or not committed in his presence, if reasonable grounds existed for the arrest. *United States* v. *Watson*, 423 U.S. 411 (1976). This common law authority included the right to enter a private dwelling in order to effect an arrest. 2 Hale, *Pleas of the Crown* 90-92 (1st Am. Ed., 1847); 4 Blackstone's *Commentaries* 292; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 798, 802-806 (1924); *Wharton's Crim. Proc.*, sec. 82 (12th Ed. 1972); *Commonwealth* v. *Phelps*, 209 Mass. 396, 95 N.E. 868, 873 (1911); *Stanley* v. *Wells*, 71 Ill. 78 (1873); *United States* v. *Dean*, 50 F. 2d 905 (D.C. Mass. 1931). An arresting officer armed with probable cause could freely enter the premises of the person sought to be arrested as long as the entry was peacefully accomplished and no force or "breaking" was required. "Breaking" did not include entry through an open door, *Smith* v. *Tate*, 143 Tenn. 268, (1921), admittance by a third person, *Read* v. *Case*, 4 Conn. 166 (1822), *Argetakis* v. *State*, 24 Ariz. 599 (1923), or admittance by the arrestee even if deception or ruse was employed to gain entrance, *Rex* v. *Backhouse*, 98 Eng Rep. 533 (1763), *Wilgus* at 806. The "breaking" of doors and windows to gain entry was authorized if the officer was refused quiet admittance after announcing his purpose and demanding admission. 4 Blackstone's *Commentaries* 292; 2 Hale, *Pleas of the Crown* 90-92 (1st Am. Ed., 1847); Wilgus at 803; *Commonwealth* v. *Phelps*, 209 Mass. 396, 95 N.E. 868, 873 (1911); Bankin, *Criminal Trial Procedure in the General Court of Colonial Virginia*, pp. 74-75; *Smith* v. *Tate*, 143 Tenn. 268, 227 S.W. 1026 (1921); *Argetakis* v. *State*,

212 P. 372 (1923).[6] Even announcement and demand were not required in all situations, such as where the peril would have been increased or the purpose and identity of the officer was already known. Wiglus at p. 802; *People* v. *Maddox*, 46 Cal. 2d 301, 306, 294 P. 2d 6, 9 (1956) cited in *Ker* v. *California*, 374 U.S. 23, 40 (1963).

These rules regulating warrantless arrests were accepted practice in both England and the United States at the time the Fourth Amendment was adopted. There is nothing in the wording of the Fourth Amendment or in the circumstances surrounding its adoption that indicates that the framers wished to alter the practice of warrantless entries for arrest. Indeed, the practice which the framers did intend to alter was the practice of issuing general warrants and writs as assistance. *Stanford* v. *Texas*, 379 U.S. 476, 481-485 (1965); Lasson, *History and Development of the Fourth Amendment of the United States Constitution*, Ch. II (1937).

In interpreting and applying the provisions of the Fourth Amendment this Court "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant". *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975). Although the Court has not squarely answered the question of whether a warrant is necessary

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6. A few early commentators took the position that, in the absence of fresh pursuit a warrant should be obtained before breaking doors. 2 Hawkins, Pleas of the Crown, Ch. 14, sec. 7 (1787); Coke, Fourth Institute of the Laws of England 177 (1797). However, even these writers did not challenge the rule that a warrantless entry could be made if peaceable.

to enter private premises in order to effect an arrest, several decisions seem to acknowledge the validity of the common law rule permitting warrantless entries.

In *Johnson* v. *United States*, 333 U.S. 10 (1948), this Court held that a warrantless entry into a hotel room for the purpose of arresting the occupant was unlawful not due to the lack of a warrant but because the officers did not know the identity of the occupant. The Court stated in dictum that the warrantless entry would have been proper if the officers had reasonable cause to believe that a particular person located therein was guilty of a felony. 333 U.S. at 15. *Ker* v. *California*, 374 U.S. 23 (1963) upheld a warrantless entry into an apartment for the purpose of making an arrest after proper notice of authority and purpose had been given by the officers. The dissenting Justices questioned the adequacy of the notice but did not question the rule permitting warrantless entries, or forcible warrantless entries after proper notice. Likewise, in *Sabbath* v. *United States*, 391 U.S. 585 (1968), the Court proceeded on the assumption that a warrantless entry based on probable cause is reasonable if no "breaking" is involved or if "breaking" is involved the entry is still reasonable if preceded by proper announcement and demand. The opening of a closed door was held a "breaking" under 18 U.S.C. 3109 and since it was not accompanied by any announcement the entry was unlawful. As in *Miller* v. *United States*, 357 U.S. 301 (1958), the common law basis for 18 U.S.C. 3109 was noted. 391 U.S. at 589.[7]

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7. This is not to say that doubts have not been expressed by members of this Court from time to time. See, Coolidge v. New Hampshire, 403 U.S. 443, 476-481 (1971); United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 839 n. 12 (1976).

The common law rule authorizing warrantless entries went virtually unchallenged until 1970. In that year the Court of Appeals for the District of Columbia in *Dorman* v. *United States*, 435 F. 2d 385 (D.C. Cir. 1970, en banc), held that absent "exigent circumstances" or "urgent need" a warrant is required before an arrest entry onto private premises can be made. 435 F. 2d at 392. The *Dorman* rule has been followed in the Fourth, Sixth, Eighth and Ninth Circuits. See, *Vance* v. *North Carolina*, 432 F. 2d 984 (4th Cir. 1970); *United States* v. *Shye*, 492 F. 2d 886 (6th Cir. 1971); *Salvador* v. *United States*, 505 F. 2d 1348 (8th Cir. 1974); *United States* v. *Phillips*, 497 F. 2d 1131 (9th Cir. 1974). The Second, Fifth and Seventh Circuits have refused to alter the common law rule. See, *United States* v. *Rollins*, 522 F. 2d 160, 167 (2nd Cir. 1975); *United States* v. *Wysocki*, 457 F. 2d 1155, 1159 (5th Cir. (1972); *United States ex rel. Wright* v. *Woods*, 432 F. 2d 1143 (7th Cir. 1970). The state courts are also split on the issue, with the majority permitting both peaceful and forceful warrantless entries.[8]

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8. State courts following the common law rule include: State v. Perez, 277 So. 2d 778 (Fla. 1973); State v. Pontier, 518 P. 2d 969, 974 (Id. 1974); People v. Johnson, 259 N.E. 2d 57 (Ill. 1970); Wanzer v. State, 97 A. 2d 914 (Ct. App. Md. 1953); People v. Eddington, 178 N.W. 2d 686, 691 (Ct. App. Mich. 1970); State v. Howard, 162 S.E. 2d 495, 505 (N.C. 1968); State v. Handy, 242 A. 2d 888 (N.J. 1968); People v. Santiago, 384 N.Y.S. 2d 361 (Sup. Ct. Bronx Co. 1976); White v. State, 356 S.W. 2d 411 (Tenn. 1962); John v. State, 249 N.W. 2d 593 (Wis. 1977). State courts which adhere to the Dorman rule include: People v. Ramsey, 545 P. 2d 1333 (Cal. 1976); Comm. v. Ford, 329 N.E. 2d 717 (Mass. 1975). Other courts have avoided the issue by assuming arguendo the need for exigent circumstances and finding them in the particular case. See, State v. Johnson, 232 N.W. 2d 477 (Ia. 1975); State v. Lasley, 236 N.W. 2d 604 (Minn. 1975); State v. Girard, 555 P. 2d 445 (Ore. 1976).

Those cases holding that a warrantless entry is per se unreasonable rely on the rationale that the protection afforded persons in their homes against warrantless searches and seizures of inanimate objects is no less applicable when the individual himself is seized. See, e.g., *Dorman* v. *United States*, 435 F. 2d 385, 390 (D.C. Cir. 1970). However this analysis ignores the fundamental difference between a search warrant and an arrest warrant.

An arrest warrant is issued upon a showing that there are reasonable grounds to believe that a person has committed an offense regardless of the present location of the person sought. *Jones* v. *United States*, 362 U.S. 257 (1960). A search warrant is issued when it is demonstrated that certain objects are connected with a crime and are presently located in a particular place. The distinction between the two types of warrants is necessitated by the nature of the things sought. A person who has committed a crime possesses both the desire and ability to change his location freely. An inanimate object is capable of no such desire and has no such ability. It remains stationary until acted upon by some outside force. The mobility factor is not reduced by the fact that at a particular point in time the police have reason to believe that an offender can be located at a particular place. Further, the protection conferred by a search warrant against wholesale rummaging through a private dwelling and personal effects is generally unnecessary in the case of an arrest entry. If the suspect does not come to the door in response to an officer's knock, and entry into

the premises is thereby required, the scope of the search will be far less intrusive than a search for weapons, narcotics, etc.

The adoption of a rule providing that arrest entries are per se unreasonable unless exigent circumstances exist would place a burden on arresting officers never intended by the Fourth Amendment. The *Dorman* Court lists seven factors to be considered when determining if exigent circumstances are present. 435 F. 2d at 392-393. Even assuming that these factors include all pertinent considerations the police are put in the position of conducting a "mini pre-arrest hearing" to determine whether warrantless entry is permissible. Are some factors more important than others? What if some factors indicate warrantless entry is proper and other militate against such entry? Exactly which factors are present? The arresting officer must guess and then act at his peril. The fast developing and often ambiguous situations confronting police officers do not allow law enforcement officials the luxury of looking over their list of factors, balancing them and then arriving at a sterile, hopefully correct decision. If the decision is to arrest without a warrant then the existence or non-existence of these same factors will be litigated again, this time in court on defense counsel's motion. Cf. *United States* v. *Watson*, 423 U.S. 411, 96 S. Ct. 820, 828 (1976). Also, Mr. Justice Powell's observation in his concurring opinion in *Watson* that requiring a warrant would interfere with the proper timing of arrests is applicable in private as well as public arrest situations. 96 S. Ct. at 831-832.

If a hard and fast rule is to be adopted concerning warrantless entries, the approach taken by the American Law Institute is superior to that suggested in *Dorman*. *A Model Code of Pre-Arraignment Procedure*, sec. 120.6(1) (1975),

establishes a presumptive need for a warrant for nightime arrests unless the arresting officer reasonably believes that a prompt arrest is necessary to prevent harm to bystanders, destruction of evidence or escape. Otherwise the common law rule permitting warrantless entries is followed since, "to go further and require a warrant or a showing of necessity before police may make a felony arrest on private property even in the daytime seems unduly restrictive". Id. at 146.

It is submitted, however, that the best approach is that taken by the common law, a majority of the jurisdictions in the United States, and by the Fourth Amendment itself namely, a warrantless entry into a private dwelling to effect an arrest is valid if there is probable cause to believe the person sought is within the dwelling and has committed a felony and the method of entry and arrest are reasonable. See, *United States* v. *Santana*, —— U.S. ——, 96 S. Ct. 2406 (1976) (White J., concurring). An individual's right to privacy would be protected by the requirements of probable cause, reasonableness, the rule that persons arrested without a warrant be taken before a judge for a probable cause hearing without unnecessary delay (see, e.g., Ill. Rev. Stat., Ch. 38, sec. 109-1), and by strategic incentives for police to obtain warrants where possible.[9] The community's right to

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9. One incentive is the tendency of courts to find probable cause more readily in close cases when a judge makes the initial finding. Also, in jurisdictions which prohibit defendant's going beyond the four corners of the arrest affidavit to challenge the facts asserted therein (see, People v. Bak, 45 Ill. 2d 140, 258 N.E. 2d 341 (1970)) the defendant will not be able to secure an evidentiary hearing to determine whether there was probable cause if the affidavit is

effective law enforcement is safeguarded by freeing police from the uncertainty of a complex balancing procedure and freeing the judiciary from endless litigation centering around new warrant requirements. See, *United States* v. *Watson*, 423 U.S. 411, 96 S. Ct. at 831-832 (Powell, J., concurring).

A general rule permitting reasonable warrantless entries based upon probable cause is however not necessary to uphold the instant warrantless arrest. One of the arresting officers, prior to proceeding to petitioner's residence, telephoned Lucille Browder, petitioner's mother. He identified himself stating that he was a "Youth Officer investigating an assault, and the girl said it was a teen-aged boy by the name of Browder and I [have] the name Tyrone on the record". The mother responded "if it was an assault on a girl it wouldn't be Tyrone it would be Ben Earl" (A. 141-142). At this point in the conversation the arresting officer asked if either of the boys were home. Mrs. Browder responded they were both present. The arresting officer then asked if she would keep them at home so he could come and talk to them (A. 141-142). Immediately thereafter, the arresting officers went to the Browder residence, met Mrs. Browder at the door, and identified themselves. Mrs. Browder "invited" the officers into the house stating that Tyrone and petitioner and two other teen-aged boys were on the premises (A. 142). Mrs. Browder's consent to the entry, vitiated any need for a warrant, assuming a warrant is constitutionally required. Cf. *Schneckloth* v. *Bustamonte*,

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sufficient on it's face. As a result he will be deprived of an opportunity for discovery, creating impeachment material and litigating a credibility issue prior to trial if a warrant is obtained.

412 U.S. 235 (1973). The voluntary nature of the consent is implicit from the totality of the circumstances. No force, threat or even trickery[10] was used to gain entrance. Indeed the request for entry was made under the least intimidating circumstances—over the telephone. Mrs. Browder gave no indication whatsoever that she was opposed to the police coming to her home. In fact she attempted to assist the police in their mission by advising them that it was more likely petitioner than Tyrone that they wanted. During the time it took the officers to proceed from the station to the residence, Mrs. Browder had time to consider whether or not she wanted to allow the police in her home and to consult with other family members. See, *Bowles* v. *United States*, 439 F. 2d 536 (D.C. Cir. 1970) ("Mrs. Burwell's awareness that police would probably arrive at her home at date and time she had focused is really a greater protection than that she would have obtained from the usual Magistrate's ex parte warrant".) Upon their arrival at 6:00 p.m., Mrs. Browder "invited" the police inside her home giving no indication that the decision was other than an exercise of her free will. Since there was "nothing constitutionally suspect in the subjective forces that impelled [Mrs. Browder] to cooperate with the police", *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488 (1971), the consent was

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10. Even entry by trickery or deceit without a warrant has been upheld by virtually all courts considering the question. See, United States v. Beale, 445 F. 2d 977 (5th Cir. 1971); United States v. Syler, 430 F. 2d 68 (7th Cir. 1970); Leahy v. United States, 272 F. 2d 487 (9th Cir. 1959); Grzesiowski v. State, 343 N.E. 2d 305 (Ct. App. Ind., 1976); Mullaney v. Maryland, 246 A. 2d 291 (Ct. Sp. App. 1968). Also see, Sabbath v. United States, 391 U.S. 585, 590 n. 7 (1968).

voluntary. Also see, *Bowles* v. *United States,* 439 F. 2d 536 (D.C. Cir. 1970); *People* v. *Simmons,* 49 Mich. 80, 211 N.W. 2d 247 (Ct. App. Mich. 1973); *People* v. *Lara,* 117 Cal. Rptr. 549, 528 P. 2d 365 (S. Ct. Cal. 1974).

Even without consent, a warrant should not be required in cases where, as here, probable cause exists to believe the defendant is in the premises and has committed a felony; the entry is made at a reasonable hour, 6:00 p.m., and is not only peaceable but at least acknowledged by the owner of the premises; the entry is made solely to arrest and not to search; and the person sought is accused of a violent crime and has threatened his victim's life.

Finally, even if this Court were to adopt the *Dorman* rule, the instant arrest was proper in light of the exigent circumstances necessitating it. First, a grave offense of violence was involved. Second, petitioner was reasonably believed to be armed, since he was armed with a handgun when he committed the rape. Third, the information possessed by the police including petitioner's last name and address, was obtained from a "reasonably trustworthy" source, the victim. Fourth, there was strong reason to believe that petitioner was on the premises being entered because his mother said so. Fifth, the entry was made peaceably, if not consented to. Sixth, the entry was made at 6:00 p.m., not an unreasonable hour. Lastly, the police could reasonably believe that petitioner would try to escape or at least avoid apprehension. Balancing these factors outlined in *Dorman* the only reasonable conclusion is that exigent circumstances required a warrantless arrest.

In summary, the Fourth Amendment does not mandate a rule providing that all warrantless entries into private dwellings for the purpose of arrest are per se invalid. As long as probable cause exists and the mode of arrest is reasonable as in the instant case Fourth Amendment dictates have been met. Assuming a per se rule is constitutionally required a warrant was not necessary in the instant case due to the consensual entry or alternatively the exigent circumstances.

II.

PETITIONER'S CLAIM THAT CERTAIN EVIDENCE INTRODUCED AT HIS STATE TRIAL WAS THE "FRUIT" OF AN UNLAWFUL ARREST IS NOT COGNIZABLE UNDER THE HABEAS CORPUS ACT.

A.

Petitioner's Claim Has Been Waived By His Failure To Raise The Issue At Trial As Required By Illinois Law And By His Failure To Demonstrate "Cause" For The Noncompliance With State Procedures And "Actual Prejudice" Resulting From The Alleged Constitutional Violation.

Illinois law requires that a motion to suppress a confession or a motion to suppress evidence illegally seized "shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion". Ill. Rev. Stat. (1971), Ch. 38, secs. 114-11(g), 114-12(c). The motion may be made during trial if the court finds that the motion is not untimely. Id.[11] Failure to challenge a confession or other evidence in the trial court pursuant to these provisions constitutes a waiver of the issue. *People* v. *Jones,* 31 Ill.

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11. These procedural rules are virtually identical to the "contemporaneous" objection rule at issue in *Wainwright* v. *Sykes,* ——U.S.——, 45 L.W. 4807, 4809, n. 5.

2d 42, 198 N.E. 2d 821 (1964); *People* v. *Ikerd,* 26 Ill. 2d 573, 188 N.E. 2d 12 (1963). This rule applies specifically to a claim that evidence constituted fruit of an unlawful arrest. *People* v. *Nilson,* 44 Ill. 2d 244, 255 N.E. 2d 432 (1970); *People* v. *Sockwell,* 7 Ill. App. 3d 520, 288 N.E. 2d 33 (1972).

In the trial court petitioner filed a motion to suppress his confession alleging that he was not given the *Miranda* warnings and that the confession was a product of mental coercion (A. 17). Petitioner also moved to suppress identification testimony on the ground that the lineup procedure was unnecessarily suggestive (A. 48-49). A hearing was held on each motion and both were denied (A. 49-50). Petitioner never raised the contention in the trial court that the confession and identification testimony were the fruits of an unlawful arrest. On direct appeal the legality of the arrest was raised but the appellate court refused to consider the question, relying on the settled principle in Illinois law that failure to raise the issue in the trial court constituted a waiver. (A. 7-15). Petitioner also filed a petition pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., Ch. 38, sec. 122-1 et seq., alleging that his arrest was unlawful. The dismissal of the petition by the trial court was upheld on appeal, the appellate court concluding that it was bound by the finding of waiver on direct appeal (A. 106-109).

The Illinois Courts refused to consider petitioner's claim that the fruits of an unlawful arrest were unconstitutionally used against him at trial because petitioner failed to raise the issue in a manner prescribed by Illinois' procedural rules. This independent and adequate state procedural ground prevents consideration of the merits of the claim here absent a showing by petitioner

of cause for the noncompliance and a showing of actual prejudice resulting from the alleged constitutional violation. *Wainwright* v. *Sykes,* ——U.S.——, 45 L.W. 4807 (1977).

In the district court petitioner did not offer any explanation for his failure to object to the evidence on the basis of an unlawful arrest. He did, however, contend that there could be no waiver for federal habeas purposes because there was no deliberate tactical decision to forego the claim in state court. The district court relying upon *Fay* v. *Noia,* 383 U.S. 391 (1963) and *Allum* v. *Twomey,* 484 F. 2d 740 (7th Cir. 1973), concurred in petitioner's analysis, stating:

> Rather waiver of a constitutional claim requires objective evidence that the omission was the result of an intelligent and deliberate relinquishment as part of counsel's trial strategy, and not inadvertent or negligent mistake. [citations omitted] (A. 113).
>
> . . . [F]rom the nature of the evidence introduced at petitioner's trial no reasonable tactical basis is apparent to justify the failure to object. (A. 113)

Petitioner's analysis accepted by the district court does not establish "cause" as that term was used by this Court in *Wainwright* v. *Sykes, supra.* First, it erroneously places the burden of showing a deliberate relinquishment as part of trial strategy on the State. To the contrary it is petitioner's burden to show "cause" however that term is defined for the failure to raise the issue. Petitioner does not meet or attempt to meet that burden but relies on the State's alleged inability to demonstrate a tactical basis for the omission. Second, the district court's analysis is faulty in that it holds that the nature of the challenged evidence precluded any reasonable basis for failing to

object. This ignores the fact that petitioner's trial counsel *did* object to the identification testimony and the confession. He chose to object on the grounds of an impermissively suggestive line-up and inadequate *Miranda* warnings rather than on the grounds of an illegal arrest. However, the decision concerning which legal grounds to assert on a motion to suppress is peculiarly within the domain of trial counsel and is in effect a decision in tactics. It would be difficult to question trial counsel's decision not to challenge the arrest in light of the status of the law in Illinois at the time.[12]

Moreover, whatever the reason for trial counsel's decision not to raise the issue, it was not due to the lack of knowledge of the "contemporaneous objection rule" or a lack of knowledge of the facts underlying the petitioner's arrest. Counsel filed two motions to suppress pursuant to the Illinois statutes providing that such motions must be filed in the trial court. His knowledge of the underlying facts is demonstrated by reviewing the record and is acknowledged by petitioner. See Petitioner's Brief at 45. Trial counsel repeatedly brought out through the State's witnesses at trial that four persons were arrested without

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12. Under applicable Illinois law a confession obtained as a result of an unlawful arrest was admissible at trial if voluntary. See, *People* v. *Miller,* 13 Ill. 2d 84, 148 N.E. 2d 455 (1958); *People* v. *Hudson,* 38 Ill. 2d 616, 233 N.E. 2d 403 (1968). The voluntary nature of the instant confession is beyond question. See, p. 36 herein. Also relevant is the Illinois Appellate Court's observation concerning petitioner's claim: "We also doubt seriously that his identification in the lineup, his oral confessions after that identification and his positive in-court identification can be considered as the 'fruits' of that arrest" (A. 11).

a warrant for "investigation of rape" in an attempt to convince the jury that the true identity of the rapist was uncertain (A. 58-59, 63, 67, 72-73, 81-82). It is important to note that petitioner did not allege in his petition and does not allege here that his counsel was incompetent and therefore unable to exercise professional judgment in matters relating to petitioner's defense.[13]

In *Sykes* this Court expressly declined to define the precise scope of the "cause" requirement. Whatever the content of that term, however, it should not include a situation like the one presently before the court where trial counsel objects to the evidence challenged in the habeas petition but on grounds other than those petitioner suggests, knew of the facts forming the basis for the objection suggested by petitioner and actually used those facts in the defense, is not alleged to be incompetent and demonstrates his competency by his conduct at trial and in securing an acquittal on one charge. To allow the cause requirement to be met by presuming that trial counsel inadvertently overlooked a possible constitutional issue would negate petitioner's burden, find no support in the state court record and render the cause requirement ineffectual in precluding habeas petitioners from asserting claims not raised at trial.

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13. On the basis of the state court record such a claim would be meritless. Trial counsel filed a number of pretrial motions, thoroughly cross-examined the State's witnesses, asserted the only reasonable defense to the State's strong case and secured the acquittal of petitioner on the armed robbery charge. Both State appellate courts that reviewed petitioner's conviction commented favorably on trial counsel's representation (A. 12, 107).

Neither has petitioner demonstrated, or can he demonstrate on the basis of the record before the Court, that he was actually prejudiced by the alleged constitutional violation. Petitioner's contention is that the Fourth Amendment was violated by the means used to secure evidence against him. The sanction imposed when evidence is seized contrary to the terms of the Fourth Amendment is exclusion of that evidence. The purpose of the exclusionary rule is to deter unlawful police conduct, not for a particular defendant's benefit, but for society's benefit. *United States* v. *Calandra,* 414 U.S. 338, 348 (1974). Accordingly, failure to exclude evidence illegally seized does not "prejudice" an individual defendant, but only prejudices society in its attempt to deter unlawful police conduct.

In any event, prejudice must mean more than merely harmful to the accused since all evidence introduced by the State is prejudicial in this regard or it is not relevant. Also, in the context of a waiver issue prejudice should not be equated with the harmless error doctrine applied in direct appeals where objection has been made in the trial court. Cf. *Stone* v. *Powell,* 428 U.S. 465 (1976). To equate the two would render the opinion in *Sykes* at best unnecessary and at worst meaningless because that case could have then been disposed of by merely applying the harmless error rule. Application of such a stringent standard also works against the societal interests sought to be protected by *Sykes* without advancing the constitutionally protected interests of the accused, foremost among which is the right to a fair trial. The test in habeas cases where the claimed error centers around the admission of certain items of evidence should be whether the evidence was so inherently unreliable as to impugn the integrity of the fact finding process and thereby deny

the petitioner a fair trial. Cf. *Stone* v. *Powell, supra.* This definition of prejudice serves to protect both the accused's right to collaterally attack a conviction which was the result of a "miscarriage of justice", *Wainwright* v. *Sykes, supra* at 4812, and society's interest in the finality of judgments. Under this analysis petitioner was not prejudiced.

The state trial court (A. 50) and the district court (A. 116) found that the in-court identification of petitioner was reliable in that Ms. Johnson had sufficient opportunity "to observe, to note and to remember her assailant apart and unaffected by any subsequent lineup identification" (A. 116). The positive in-court identification was not discredited by cross-examination and was as reliable as any in-court identification can be. After an evidentiary hearing the trial court found that the lineup procedures were not impermissively suggestive (A. 50) This finding has not been challenged in any state proceeding or in the habeas petition.[14]

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14. In this Court petitioner alludes to an "unnecessarily suggestive lineup" in that petitioner was the only participant wearing a white hat with a bandage on his right hand. Petitioner's Brief at 48, n. 54. Each participant wore the clothing in which he was arrested. No clothing was distributed at the lineup (A. 74, 85). Also the victim testified that she did not make the identification "by viewing the bandage" but "by his voice and face". (Tr. of Proceed., Aug. 23, 1971, p. 7). See, *Manson* v. *Brathwaite,* ——U.S.——, 45 L.W. 4681 (1977). The question of whether the lineup identification testimony was admissible holds little importance in the "prejudice" analysis since even if inadmissible the error was clearly harmless under the traditional harmless error doctrine.

Likewise there is no indication that petitioner's confession was untrustworthy. Indeed, the relevant circumstances compel a contrary conclusion. Petitioner was given, and acknowledged that he understood, the *Miranda* warnings three times before he confessed. Petitioner was advised of his *Miranda* rights at the time of the arrest in his home (A. 27). At the police station immediately after the line-up identifications, petitioner called one of the arresting officers off to the side and started to confess to the Johnnie Mae Johnson rape. The officer interrupted petitioner by saying "now wait a minute" and advised him of his rights (A. 56). Petitioner then confessed to raping Miss Johnson, but denied possessing a gun at the time and also denied raping Miss Alexander, the other rape victim who identified him in the line-up (A. 28-29). At this point the officer summoned a detective assigned to the case (A. 57). The detective re-advised petitioner of his constitutional rights and petitioner again confessed (A. 44).

No interrogation, no request for a statement was involved. When petitioner asked to see the officers and began to confess, he was stopped and re-advised of his rights. The voluntary nature of the statement and, therefore, its reliability is obvious. So found the trial judge and that finding has not been challenged in any proceeding (A. 50). It is also important to note, when considering whether the confession was "prejudicial", that the confession was at least partly responsible for petitioner's acquittal on the armed robbery charge. Apparently the jury believed petitioner's statement, including the portion wherein he denied possessing a gun at the time of the rape.

In conclusion petitioner has not and cannot on the basis of the record show sufficient "cause" to cure his failure to raise the arrest issue in the trial court. Nor can "prejudice" be shown in a habeas context since the evi-

dence allegedly secured as a result of an unlawful arrest violated no personal right of defendant and was not untrustworthy and therefore the proceedings against petitioner were not tainted or rendered unfair by the admission of such evidence.

B.

The Issue Is Not Cognizable Under The Habeas Corpus Act Since Illinois Provided The Opportunity For Full And Fair Litigation Of Petitioner's Fourth Amendment Claim And, If Relevant, The Evidence Sought To Be Excluded Was Reliable.

> ". . . [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."
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> *Stone* v. *Powell*, 428 U.S. 465, 495 (1976) (footnotes omitted).

In order to determine whether the *Stone* v. *Powell, supra,* rationale bars petitioner's Fourth Amendment claim two questions must be addressed: (1) did the State of Illinois provide an opportunity for the full and fair litigation of petitioner's Fourth Amendment claim, and if so, (2) does the nature of the challenged evidence, i.e., identification testimony and confession, remove this case from the bar established in *Stone*?

The adequacy of the Illinois procedures can only be determined when they are judged against the purpose of the "opportunity for full and fair litigation" requirement.

The prime, if not the sole, purpose of the rule excluding illegally obtained evidence is to deter future unlawful police conduct. *United States* v. *Janis*, 428 U.S. 433, 446 (1976). The *Stone* court concluded that refusing to consider illegally seized evidence claims in habeas actions would not have an adverse impact on the deterrent effect of the exclusionary rule. 428 U.S. at 493. This is only true, however, if the State provides an opportunity for the litigation of Fourth Amendment claims. For if habeas relief is not available and state procedures are not available, then there is no incentive for police officers to abide by the requirements of the Fourth Amendment. They would then be free to ignore the constitutional rules governing searches and seizures because they would know that the issue could never be raised in state or federal proceedings. The Illinois procedures outlined above provide the opportunity for the full and fair litigation of Fourth Amendment claims. The fact that illegally seized evidence will be suppressed pursuant to these provisions guarantees continued deterrence of unlawful police conduct.[15] The fact that a defendant can waive his right under Illinois law to present search and seizure claims does not change this result unless it is presumed that Illinois police officers will ignore the Fourth Amendment in the hope that a defendant will not timely raise the issue in state court.

Petitioner claims that Illinois denied him the opportunity to litigate his claim because of his court-appointed attorney's non-tactical failure to raise the issue in the trial court. The "tactical failure" language employed by pe-

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15. Assuming that the exclusionary rule deters unlawful police conduct at all.

titioner is derived from this Court's decision in *Fay* v. *Noia*, 383 U.S. 391 (1963) and the Seventh Circuit Court of Appeals' decision in *United States ex rel. Allum* v. *Twomey*, 484 F. 2d 740 (7th Cir. 1973). Whatever the impact of *Wainwright* v. *Sykes*, *supra*, on these decisions, the fact remains that the "tactical failure" language was developed to assess claims of waiver. However, the waiver doctrine is distinct from the concern of the *Stone* Court that a state provide an opportunity for the litigation of issues. Waiver in effect is giving up one's right to assert a claim. The opportunity for full and fair litigation of a claim goes to the avenues a state provides by which a claim can be raised. A petitioner's attorney's decision not to raise an issue in state court may or may not constitute a waiver of the issue, but it does not in any way bear upon the availability of state avenues of relief. In other words, if the State has provided the opportunity to raise an issue, trial counsel's failure to make use of the opportunity does not alter the fact that the opportunity existed. Waiver not being an issue in the application of *Stone*, the "tactical failure" formula urged by petitioner is inapposite.[16]

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16. As noted previously, petitioner does not contend that his counsel was incompetent, nor could such a claim prevail on the record before the court. See, pp. 32-33 herein. Even if petitioner did allege that his counsel was incompetent by failing to assert the Fourth Amendment claim, the applicability of *Stone* would not be negated because the alleged incompetence would have no bearing on the deterrent effect of the exclusionary rule. As stated in *LiPuma* v. *Commissioner*, ——F. 2d——, n. 6 (2nd Cir. July 11, 1977):

The second question to be addressed is whether the nature of the evidence sought to be excluded by petitioner removes this case from the *Stone* holding.

Petitioner did not contend in his petition and does not contend here that the manner of securing the evidence affected its reliability. Therefore, the nature of the challenged evidence has no relevance in applying *Stone*. In this Court petitioner does attack the confession and identifications as intrinsically unreliable because the confession was fabricated and the lineup suggestive. This claim, however, is separate and distinct from the Fourth Amendment question presented in *Stone* and is not before the Court since it was not raised in the habeas petition.

If the nature of the evidence is relevant, this factor only lends further support to respondent's position that *Stone* bars relief. This is due to the fact that the challenged evidence was reliable. See, pp. 35-36 herein.

Finally, a brief response to petitioner's claim that the "flagrant" police misconduct distinguishes *Stone* is appropriate. Even assuming that the police were guilty of

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The fact that petitioner's claim is ostensibly grounded on the Sixth rather than the Fourth Amendment does not negate Stone's applicability because at the heart of this case lies an alleged Fourth Amendment violation. That is, should petitioner have succeeded in showing, in the state trial court, that the police entry into Room 613 was an unconstitutional search and seizure, the remedy decreed for such a violation would have been the exclusion of the allegedly "tainted" testimony of the police officers regarding the circumstances of LiPuma's arrest. The same remedy of exclusion is now sought by way of a collateral habeas corpus proceeding, where a Sixth Amendment claim has been added for good measure.

flagrant misconduct, that fact should not negate the applicability of *Stone* since "Even if one rationally could assume that some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Stone* v. *Powell, supra,* at 493. More importantly, no objective assessment of the circumstances surrounding petitioner's arrest outlined above can support the conclusion that there was "flagrant misconduct". Any finding of "flagrant misconduct" would be impossible to reconcile with the fact that three Justices of the Seventh Circuit Court of Appeals held the arrest to be entirely lawful.

III.

RESPONDENT'S NOTICE OF APPEAL WAS TIMELY FILED BECAUSE THE HABEAS CORPUS ACT DICTATES THE PROCEDURES TO BE FOLLOWED IN OBTAINING A FINAL, APPEALABLE ORDER.

The order of the district court granting the habeas petition was issued on October 21, 1975. Twenty-eight days later respondent filed a "Motion To Further Stay Execution Of The Writ Of Habeas Corpus And To Conduct An Evidentiary Hearing" (A. 118-119). The district court granted the motion, further stayed execution of the writ and conducted an evidentiary hearing. After the hearing the court ruled that it properly granted the petition on October 21, 1975. The day after this ruling, January 27, 1976, respondent filed a notice of appeal.

Petitioner contends that respondent's motion for a further stay and evidentiary hearing was not filed within the mandatory time limitation (10 days) of Rules 52 and 59

of the Federal Rules of Civil Procedure and, therefore, did not toll the time within which to appeal from the "final order" of October 21, 1975. As a result respondent's notice of appeal was not filed within the 30 day limit of Rule 4 of the Federal Rules of Appellate Procedure and the court of appeals lacked jurisdiction over the case.

Respondent initially replies that the October 21, 1975 order was not a final order "leaving nothing to be done but to enforce by execution what had been determined", *Catlin* v. *United States,* 324 U.S. 229, 236 (1945), because all required procedures under the Habeas Corpus Act had not been completed at the time the order was issued.

Sections 2243 and 2254(d) of the Habeas Act require that an evidentiary hearing be conducted on a habeas petition unless the petition and return or answer present only issues of law. Also see, *Townsend* v. *Sain,* 372 U.S. 293 (1963). Elaborating on this requirement, Rule 8 of the recently enacted Federal Rules Governing § 2254 Proceedings provides:

> (a) Determination by court. — If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. *If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.*
> (Emphasis added.)

Thus, a truly final order in a habeas action can be entered only after the district court has completed the steps required by statute, including making the determination of whether an evidentiary hearing is required.

In the present case, the district judge's October 21, 1975 Opinion decided only respondent's preliminary Motion to Dismiss; it neither considered nor ruled on the desirability of an evidentiary hearing, although issues of fact were certainly present (see A. 111-117). Even though language used at the end of the end of the Opinion granting the Writ indicates a belief that the matter was being concluded in the district court, the Opinion cannot be considered a final order under 28 U.S.C. 2253 because it left unresolved the statutorily prescribed question of whether an evidentiary hearing would be required on the petition.

Respondent has been consistent throughout this action in maintaining that the October 21 Opinion was not a final order within the meaning of § 2253. Respondent's follow-up motion, far from being one for reconsideration, was entitled "Motion To Further Stay Execution Of The Writ Of Habeas Corpus and To Conduct An Evidentiary Hearing." (See A. 118-119). The Motion suggested that an evidentiary hearing should have been held before any order granting the Writ was issued; it cited the Habeas Corpus Act, *Townsend* v. *Sain,* 372 U.S. 293 (1963) and *United States ex rel. McNair* v. *State of New Jersey,* 492 F. 2d 1307, 1309 (3rd Cir. 1974), as supporting the respondent's right to present evidence outside the record on disputed issues. The Motion pointed out that there had never been a state or federal hearing on the validity of petitioner's arrest, and thus if the petition stated a cognizable cause of action, the trial record alone could not be dispositive of the factual questions underlying the probable cause issue.

It was only after conducting the evidentiary hearing on January 7, 1976, listening to the arguments of counsel and issuing its Order of January 26, 1976, that the District

Court completed all the steps required by statute in a case such as the present one. Thus the final, appealable decision of the district judge was his January 26 Order issuing the Writ "with execution stayed for five days pending prompt filing of notice of appeal and application to the Court of Appeals for a further stay." (A. 161).[17]

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17. Even if the October 21, 1975 Opinion and Order of the District Court were considered to be a final order, standing alone, still the time for appeal is properly computed from the January 26, 1976 disposition of the points raised by respondent's "Motion To Further Stay . . . And To Conduct An Evidentiary Hearing." In the directly analogous case of *United States* v. *Dieter*, ——U.S.——, 97 S. Ct. 18 (1976), this Court held that a government "Motion To Set Aside The Order Of Dismissal" of an indictment rendered the original judgment "non-final for purposes of appeal for as long as the petition is pending." 97 S. Ct. at 19. The Court said this ruling applied whether the issue raised in the government's motion was termed one of law or of fact, and regardless of the lack of a statute or a provision of Rule 4(b), F.R.A.P., expressly authorizing treatment of a post-dismissal motion as suspending the appeal limitation period. This decision and the earlier one of *United States* v. *Healey*, 376 U.S. 75, were based rather on traditional and virtually unquestioned practice rooted in considerations of judicial economy.

Since traditional habeas corpus practice as outlined in the Rules Governing § 2254 Cases contemplates an evidentiary hearing in the present type of case, and since much appellate court time would have been wasted if an appeal had been necessary just to obtain an evidentiary hearing, the principles of the *Dieter* and *Healy* cases logically apply here and require that the October 21 Opinion be considered non-final for purposes of appeal by operation of respondent's subsequent Motion.

Respondent's Notice of Appeal filed the next day, January 27, 1976, was consequently a timely notice under Rule 4(a) of the Federal Rules of Appellate Procedure.

Secondly, respondent submits that the district court was in no way bound to apply Rule 52 or 59 of the Federal Rules of Civil Procedure in this habeas action. Indeed, the Habeas Corpus Act, and the traditional practice pursuant to it, take precedence over the Federal Rules of Civil Procedure in delineating the course of a federal habeas action. As Rule 81(a)(2), Federal Rules of Civil Procedure has stated since 1968 regarding the applicability of the Civil Rules to habeas corpus procedures:

> (2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. . . .

The new Federal Rules Governing § 2254 Proceedings For the United States District Courts now plainly provide at Rule 11:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, *may be applied, when appropriate,* to petitions filed under these rules. (Emphasis added).

The fact that the district court judge granted respondent's motion to further stay execution of the writ and conduct an evidentiary hearing establishes that he chose not to apply Rule 52 or 59 in this particular case. This act was within the district court's discretion. The strict manner in which petitioner would apply Civil Rules 52 and 59 to the facts of this case is totally inconsistent with the provisions of the Habeas Corpus Act and totally inconsistent with the

above-cited Rules themselves. The second paragraph of Rule 4(a), F.R.A.P. cannot be logically read to impose Civil Rules 52 and 59 in the most literal, technical way on habeas proceedings in direct contravention of Rule 81 (a)(2) and habeas Rule 11 above.

CONCLUSION

For the reasons stated above, the Respondent respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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